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Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

RALPH E. WHITMORE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is intent to cause a risk of economic loss a necessary element of the federal bank fraud statute, 18 U.S.C. § 1344?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14(1)(b), in addition to the Petitioner, H. Derrell Smith was before the Ninth Circuit Court of Appeals on a companion case in this appeal.

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STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was rendered on February 11, 2002. A timely motion for rehearing *en banc* was denied on April 23, 2002. *See* Appendix B. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 1344.

Bank Fraud.

Whoever knowingly executes, or attempts to execute, a scheme or artifice —

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

This is at least the second case this year in which a Petition for Writ of Certiorari has been filed seeking clarification by the Court on the question of whether intent to cause risk of economic loss is a necessary element of the federal bank fraud statute. (The first was in *United States v. De La Mata*, 266 F.3d 1275 (11th Cir. 2001), *rehearing, en banc, denied*, 2001 U.S. App. LEXIS 27139 (2001), *cert. denied*, 122 S. Ct. 1543 (April 15, 2002).

The question has divided the Circuits for over a decade, without resolution by this Court. It is presented again, and is central to a just determination of the instant action.

Petitioner Ralph Whitmore ("Petitioner") is a 69 year old former Chairman of the Board of Directors of Alaska StateBank (the "Bank"). He was not the Chief Executive Officer of the Bank. Petitioner had no prior criminal record, nor had he been the subject of any adverse administrative or regulatory disciplinary ruling. The only loan Petitioner had at the Bank was a qualified home loan that was fully paid off.

The district court, which presided over two separate and lengthy trials of the instant action, determined that Petitioner did not intend to harm the Bank or to place the Bank at a risk of loss in connection with the transactions that formed the basis of the bank fraud charges (the "Transactions"). To the contrary, the district court found that those Transactions were specifically designed to benefit the Bank and to navigate it through perhaps the most turbulent economic times experienced in the State of Alaska.

In instructing the jury regarding the elements of bank fraud, the district court, presumably due to the interlocutory ruling by the Ninth Circuit, did not apply the legal precedent established in the Second and Fifth Circuits that requires the government to demonstrate that Petitioner intended to cause an economic loss to the Bank. As a consequence, and with no evidence demonstrating this fundamental element of the bank fraud statute, Petitioner was convicted on all bank fraud charges. The conviction on those charges increased the loss attributed to the offense conduct by approximately $5.1 million, and thereby increased by four levels the applicable sentencing guideline range.

Petitioner has maintained his innocence on all charges, including the bank fraud charges, through one dismissal, a mistrial, a second trial and two appeals. He continues to do so today.

A. PROCEDURAL HISTORY

The procedural history of the case underscores why the Court should grant this Petition. On March 1, 1996, the district court granted Petitioner's Motion to Dismiss certain counts of the indictment, including the bank fraud counts relating to certain dividend payments. The district court ruled, in part, that the indictment failed to allege the specific intent to establish bank fraud. In particular, the district court noted that the indictment acknowledged that the defendant acted "not necessarily to harm or cause economic loss to the bank." The district court's order was reversed by the Ninth Circuit, which found the indictment substantially alleged intent, but expressly avoided consideration of the "intent to harm" issue. *See United States v. Robert S. Ely*, 142 F.3d 1113 (9th Cir. 1997).

On May 4, 1999, the first trial of this action commenced. It was concluded on June 9, 1999. The jury acquitted Petitioner on one count of the indictment, and was unable to reach a verdict on the remaining counts of the indictment, including the bank fraud counts.

On November 16, 1999, the second trial of this action commenced. It concluded on December 16, 1999. The jury acquitted Petitioner on one count of the indictment, was unable to reach a verdict on another count of the indictment, and found Petitioner guilty on the remaining counts of the indictment, including the bank fraud counts.

B. THE TRIAL EVIDENCE

As the district court aptly noted at Petitioner's sentencing, "this is not your average typical bank fraud." This was because the Transactions did not involve the theft of bank funds. They did not involve a fraud on the depositors, nor were they prohibited by law or the Bank's internal policies or procedures. To the contrary, they involved strategic attempts by the Bank's Board of Directors to strengthen the financial position of the Bank in the face of perhaps the most severe recession in the history of the State of Alaska.

The district court recognized Petitioner's good faith efforts in a difficult economic environment, and held that it was "not persuaded that [Petitioner's] purpose here was to destroy the bank," but rather to "enhance the bank and in the end a desperate effort to save it." After contemplating all of the evidence, the district court found that the jury's determination that Petitioner "crossed the line between desperate measures to save a bank and reckless conduct"

was a "very close call." Because of the atypical nature of the case, at sentencing, the district court departed downward two levels from the applicable sentencing guideline range.

The Transactions involve loans made to certain directors, and extensions or roll-overs relating to those loans. They also involve the authorization and payment of dividends by the Bank's Board of Directors on four separate occasions in 1987.

1. *The Director Loans*

Commencing in the mid-1980s, the State of Alaska began to experience one its most significant economic downturns in the history of the state. The crash in the world oil market had a dramatic effect on Alaskan banks. Real estate speculation that was fueled by oil development in Alaska suddenly collapsed. This caused a corresponding failure in Alaskan banks. Indeed, by the end of the recession, many banks in the State of Alaska turned their keys over to federal regulators.[1]

In the mid-1980s, forecasting accurately the looming economic crisis, the Bank's Board of Directors conceived of a plan that, in their opinion, would buttress the financial condition of the Bank, and enable it to withstand the on-coming recession. The strategy involved the purchase of a substantial interest in Alaska Bank of the North ("ABN"), and the ultimate merger of the Bank with ABN. It was believed that the merger would, among other things, significantly reduce the Bank's operating costs.

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1. Petitioner believes that every commercial Alaskan bank in the Bank's market area with less than $800 million in assets lost all of their original capital.

In order to effectuate the strategic plan, the Bank's Board of Directors sought advice from counsel, who advised the Board of Directors that the most expeditious manner in which to obtain a substantial interest in ABN was for individual directors to purchase that interest directly. It was believed that any attempt by the Bank, as an entity, to purchase that interest would be met with strong opposition by ANB, and would be timely and costly. Based upon the advice of counsel, the Bank's Board of Directors authorized loans to certain directors, all of whom were creditworthy, to be used to purchase an interest in ABN (the "Director Loans").

Petitioner was not a recipient of the Director Loans. He did, however, support the Bank's strategic plan by purchasing interests in ABN using money borrowed from another bank.

The Director Loans were made openly, and with the approval of the Bank's legal counsel, which included a former General Counsel of the Federal Reserve Board. As with any other bank loan, the Director Loans were supported by financial statements and other relevant documentation and, according to one government witness, were supported by the substantial net worth of the directors. In fact, in connection with a 1987 audit, the Federal Deposit Insurance Corporation did not question the propriety or amount of the Director Loans, and determined that the directors were creditworthy.

In connection with the implementation of this strategic plan, there were no falsifications of documents, no forgeries, and no misrepresentations. The directors did not retain the proceeds of the Director Loans. The proceeds of the Director Loans were used to purchase the ABN stock.

ABN became aware of the Bank's strategic objective to acquire a substantial interest in ABN, and thereafter began erecting tactical and legal roadblocks to thwart the Bank's strategic plan. ABN challenged the legality of the stock acquisition. That challenge was reviewed and rejected by the Office of the Controller of the Currency and the Federal Reserve Board, thereby affirming the legality of the loans and the Bank's stock purchase strategy.

During the above-referenced process, the Bank's Board of Directors approved extensions or roll-overs of the Director Loans. The roll-overs were specifically reviewed and approved by the Bank's loan committee. Given the increasingly difficult economic climate, the roll-overs afforded the directors additional time to repay the Director Loans, which were personal commitments undertaken by the directors to support the Bank's strategic plan. The roll-overs did not constitute a detriment to the Bank, as no further funds left the Bank.

Despite the director's best efforts, and before they could effectuate the merger with ANB, via a friendly or hostile takeover, the continued decline of the Alaskan economy forced the closure of ANB, and foreclosed the possibility of the merger. The directors, including Petitioner, were also left holding shares in ANB that had plummeted in value.

At trial, the government alleged that Petitioner and others falsified bank documents and gave preferential treatment to the directors relating to the roll-overs — a contention that was vigorously challenged by Petitioner during the second trial. Despite the lack of any evidence suggesting an intent by Petitioner to harm the Bank, and presumably based solely

on the government's claims relating to the falsification of documents and preferential treatment concerning the roll-overs, the jury found Petitioner guilty of bank fraud.

2. *The Dividends*

The government also alleged that the Bank's Board of Directors authorized the payment of dividends to shareholders in 1987 that, given the financial condition of the Bank, were contrary to prudent bank practice. The government further alleged that the payment of those dividends constituted a scheme to defraud the Bank that was facilitated by the creation of false entries on the Bank's books and records.

Contrary to the government's assertions, the trial record reveals that every penny of the dividends was reviewed and approved by the Bank's independent auditors and outside counsel. Further, in 1988, Alaska regulators reviewed the Bank's dividend payments for 1987, and, applying FDIC examination guidelines, determined that all but a small amount (approximately $20,000) of the approximate $2.7 million in dividends were lawful given the financial condition of the Bank.[2]

Moreover, the dividends were never intended to harm the Bank, or to compromise its financial position. Rather, the dividends, which were issued in four separate installments

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2. The auditors, however, examined the propriety of the dividends as of the date of the examination, not when the dividends were issued. Given the declining nature of the economy, this analysis was flawed. Indeed, had the regulators examined the propriety of the dividends as of the date the dividends were issued, all of the dividends would have been appropriate.

to shareholders including the Bank's holding company, were designed to enable the Bank's holding company to pay down a loan by Mellon Bank to the holding company. A portion of the proceeds of that loan was used by the holding company to increase the Bank's capital, and to thereby enhance its financial condition.

The failure to repay the loan to Mellon Bank would have resulted in a default in the loan and subsequent legal proceedings. Given the economic climate, the negative publicity would have significantly eroded consumer/ depositor confidence in the Bank's ability to meet its interest and other financial obligations, and may have resulted in a run on the bank.

Although the Bank's Board of Directors, in authorizing the payment of the dividends, did not, in any way, intend to harm the bank, but to benefit it, the jury found Petitioner guilty of the bank fraud counts relating to the payment of the dividends.

The evidence at trial demonstrated that this was not a circumstance where a wayward bank executive absconded with funds and secreted them in some undisclosed location. Here, the Director Loans and dividends were issued openly, were subject to regulatory scrutiny, and were intended for a legitimate bank purpose.

This is no better illustrated than by the testimony of Donald Chapman in the first trial. At that time, Chapman was a 19 year veteran bank examiner employed by the Federal Reserve Bank. Chapman analyzed the Transactions, and testified that the Bank's "mechanics" were sound. He further testified that the Petitioner and other directors were not personally enriched by the Transactions.

C. THE SENTENCE

The bank fraud convictions significantly increased Petitioner's sentence and his potential restitution obligation. The district court determined that the amount of loss relating solely to the bank fraud counts was approximately $5.1 million. This translated into a four-level increase in the applicable sentencing guideline range, significantly increasing Petitioner's potential sentence.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE WRIT TO RESOLVE A SPLIT IN THE CIRCUITS CONCERNING THE ESSENTIAL ELEMENTS OF THE FEDERAL BANK FRAUD STATUTE.

Several Circuits agree with Petitioner that an intent to cause a risk of economic loss is an essential element of bank fraud. For example, the Second Circuit in *United States v. Laljie*, 184 F.3d 180 (2d Cir. 1999), held that in order to support a bank fraud conviction, the government must prove that the defendant intended to victimize the bank by exposing it to actual or potential loss. In *Laljie*, defendant was the secretary of a corporate executive. Two company checks were purportedly written by the executive to a company owned and operated by the secretary's husband. The executive testified that he did not recall executing or authorizing the issuance of the checks.

The Second Circuit, in reversing defendant's bank fraud conviction relating to the two checks, held that there was "no evidence that those checks were intended to victimize the bank." *Id.* at 191. This is because "[t]he insertion of a

name on a payee line that has been left blank by the maker of the check may defraud the maker; but it does not, of itself, evince an intent to defraud the bank. . . ." *Id.* Thus, the mere fact that the defendant may have obtained, through a scheme to defraud, monies held by the bank does not constitute a bank fraud unless the defendant specifically intends to victimize the bank. *See also*, *United States v. Jacobs*, 117 F.3d 82 (2d Cir. 1997) (must establish that bank was exposed to risk of loss).

The Fifth Circuit is in agreement with the Second Circuit's analysis on this issue. In *United States v. Schnitzer*, 145 F.3d 721 (5th Cir. 2000), the defendants were directors of a bank. The government alleged that the defendants defrauded the bank by authorizing a two-part real estate sham transaction that was designed to artificially increase the bank's profitability. The government argued that, in furtherance of the scheme, defendants falsified the bank's books and records, and exposed the bank to a risk of loss on the transactions.

The Fifth Circuit upheld the trial court's order dismissing the bank fraud counts. The appellate court found that the government "failed to prove that the defendants acted with an intent to injure [the bank]. . . ." *Id.* at 734. To the contrary, the court held that the risk of loss associated with the two-part real estate transaction was merely the risk of overpayment inherent in every decision to acquire real estate for value. *Id. See also*, *United States v. McCauley*, 253 F.3d 815 (5th Cir. 2001) (government must establish that defendant placed bank at risk of loss or civil liability).

Some Circuits appear to be internally conflicted on the issue. The Ninth Circuit has held that intent to cause risk of

economic loss is not a required element of bank fraud. *See United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993), *cert. denied, sub nom.*, 513 U.S. 1059 (1994); *United States v. Mason*, 902 F.2d 1434, 1442 (9th Cir. 1990). A more recent Ninth Circuit decision, however, acknowledged that other appellate courts have held that proof of an intent to cause a risk of loss is a required element of bank fraud. *United States v. Wolfswinkel*, 44 F.3d 782, 786 (9th Cir.1995). The appellate panel declined to decide whether the Ninth Circuit should follow those appellate courts.

Similarly, the First Circuit, in *United States v. Brandon*, 17 F.3d 409, 426 (1st Cir. 1994), held that a defendant must knowingly execute a fraudulent scheme that exposed a federally insured bank to a risk of loss. However, in a more recent *en banc* decision, *United States v. Kenrick*, 221 F.3d 19 (1st Cir.), *cert. denied*, 531 U.S. 961, 121 S. Ct. 387 (2000), the First Circuit appeared to retreat from this position, holding that an intent to harm the bank was not an element of bank fraud.

Other Circuits, such as the Sixth, have held that an intent to cause a risk of economic loss is not an element of bank fraud. *See United States v. Everett*, 270 F.3d 986 (6th Cir. 2001), *rehearing, en banc denied*, 2002 U.A. App. LEXIS 323 (6th Cir. 2002) (court held that it is not a defense to bank fraud that a defendant may not have intended to cause the bank to lose any money); *See also, United States v. De La Mata*, 266 F.3d 1275 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 1543 (April 15, 2002) (Failure to give risk of loss instruction did not seriously impair defendant's ability to present his defense.).

The case at hand presents an ideal factual record to resolve the conflict among the Circuits, and to finally adjudicate the issue of whether an intent to cause an economic

loss is an essential element of the bank fraud statute. Standing before the Court is an individual who, as recognized by the district court, acted only with an intent to benefit the Bank and, as recognized by a seasoned Federal Reserve Bank examiner, was not personally enriched as a consequence of the Transactions.

The district court's determination that Petitioner's intention was to save the Bank from financial ruin are fully supported by the trial record. Although the government challenged the manner in which the Director Loans were documented and processed, there was little doubt that the purpose of the Director Loans began and ended with a lawful objective — to provide the Bank with an opportunity to merge with ABN, reduce its operational costs, and improve its financial position in the face of the impending economic free-fall in the Alaskan economy. It is also clear that none of the directors used the proceeds of the Director Loans for personal reasons; or that the Director Loans were concealed from bank lawyers, auditors or regulators.

Similar to the Director Loans, the decision to authorize the payment of dividends in 1987 was not motivated by an intent to, in any way, harm the Bank or to cause a risk of economic loss to the Bank. The dividends were reviewed and approved by the Bank's outside accountants (Price Waterhouse) and outside counsel (Hogan & Hartson), as well as by state banking regulators. They were authorized to facilitate the pay down of a loan from Mellon Bank, the creditor to the Bank's holding company, which was used, in part, to increase the Bank's capital.

The recognition of the intent to cause a risk of harm element in bank fraud cases is particularly vital in cases, like

the present, which involve closely held financial institutions. Given the limited ownership of closely held financial institutions, it can be argued that virtually all transactions are, in some measure, for the personal benefit of all shareholders. The danger of applying the view articulated by the Sixth, Ninth and Eleventh Circuits is the risk that transactions that are determined to be contrary to prudent bank practice, and that also benefit the shareholders of the financial institution, can elevate a regulatory issue to the level of a criminal violation. The Second and Fifth Circuit's inclusion of the intent to cause harm as an element of the bank fraud statute safeguards against this risk, and ensures that only schemes designed to defraud or victimize the financial institution will constitute bank fraud.

The factual record is clear that, if intent to cause a risk of economic harm is an element of bank fraud, as the Second and Fifth Circuits consistently hold, the Petitioner would not have been tried on, much less convicted of, the bank fraud charges. The applicable sentencing guideline range would have also been reduced by four levels.

It is equally clear that the Petitioner has been prejudiced severely by the misapplication of the relevant law. At this stage of the proceeding, only this Court can remedy this unjust result.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED FEBRUARY 11, 2002

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 00-30152
00-30183

D.C. No. CR-94-00136-HRH

UNITED STATES OF AMERICA,

Plaintiff-Appellee/
Cross-Appellant

v.

RALPH E. WHITMORE, JR.,

Defendant-Appellant/
Cross-Appellee.

Appendix A

No. 00-30188

D.C. No. CR-94-00136-HRH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

H. DERRELL SMITH,

Defendant-Appellant.

MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
H. Russell Holland, District Judge, Presiding

Argued and Submitted November 5, 2001
Seattle, Washington

Before: REAVLEY,** B. FLETCHER, and TALLMAN, Circuit Judges.

Ralph E. Whitmore, Jr. ("Whitmore"), Chief Executive Officer of the former Alaska Statebank, appeals his jury conviction of seven counts of bank fraud, 13 counts of making

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

false entries in book and records, and four counts of misapplication of bank funds. Whitmore alleges that the evidence was insufficient to support his conviction. The United States cross-appeals the sentence imposed on Whitmore, arguing that the district court erred in sentencing him by improperly departing downward from the range imposed under the United States Sentencing Guidelines ("U.S.S.G."). In a companion case, H. Derrell Smith ("Smith"), former President of Alaska Statebank, appeals his jury conviction on one count of misapplication of bank funds and one count of making false statements regarding a loan. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the convictions and sentences of both Whitmore and Smith.

I. BACKGROUND

Alaska Statebank ("ASB") was a state chartered and federally insured bank headquartered in Anchorage, Alaska. When ASB closed in 1989, the Federal Deposit Insurance Company ("FDIC") took over as receiver and soon thereafter began an investigation into allegations of misconduct by Whitmore, Smith, and other members of the ASB Board of Directors. A grand jury indicted Whitmore, Smith, and several other board members in 1995 for various bank crimes committed between 1984 and 1989.

By the time of trial the government had negotiated plea agreements with two of the three other charged directors, and proceeded to trial on 37 counts against Whitmore and Smith. This first trial resulted in a hung jury as to most of the charged offenses, although Whitmore was acquitted of one count while Smith was acquitted of four. The government

thereafter agreed to dismiss all but two counts against Smith, the "Vozar loan" counts, when he gave testimony against Whitmore at his second trial under a grant of immunity. Whitmore was retried in November 1999 on 26 counts and was convicted on 24: seven counts of bank fraud in violation of 18 U.S.C. § 1344, 13 counts of false entries in violation of 18 U.S.C. § 1005, and four counts of misapplication of bank funds in violation of 18 U.S.C. § 656.

At sentencing, the district court determined that Whitmore was subject to an offense level of 23 under the U.S.S.G. and a sentencing range of 46-57 months. However, based on its determination that downward departures were warranted on four different bases, the court sentenced Whitmore to 24 months concurrent on each count, a two year term of supervised release, $500,000 in restitution, and a $1,250 special penalty assessment. Smith was convicted of misapplying bank funds in violation of 18 U.S.C. § 656 and of making false statements in connection with a loan in violation of 18 U.S.C. § 1014. Smith was sentenced to three years probation.

We first address the circumstances underlying Whitmore's claims. We then turn to the claims raised by Smith in his appeal.

Appendix A

II. DEFENDANT WHITMORE

A. Factual Background.

1. *The Original Director Stock Loans.*

As the controlling shareholder, Chairman of the Board, and Chief Executive Officer of ASB, Whitmore exerted considerable control over the bank and its management, including the distribution of loans and dividends. In 1984, Whitmore approached the Board about acquiring the Alaska Bank of the North ("ANBN"), with an eye toward merging it into ASB. Whitmore told the directors that ASB could not legally purchase ANBN directly and therefore requested that the directors help finance the purchase of ANBN by taking out loans from ASB — the "director stock loans" — to buy ANBN stock. While each director signed a letter stating that the loans were personal investments, that they would individually assume the risks, and that there was no agreement to have ASB protect them in case of default, Whitmore assured each director that they would not be personally responsible for repaying the loans. The directors and Whitmore thereafter entered into a Voting Trust Agreement giving Whitmore sole authority to vote all of the ANBN stock.

Each director received two loans, a $350,000 loan secured by ANBN stock and a $150,000 unsecured loan. Normal loan procedure required that a loan officer first review and analyze all relevant financial information, the purpose of the loan, and the repayment plan. Then, if a loan was recommended, it would be sent to the credit committee

for review, where summary cover sheets ("CL-10s") and financial backups were included. Loans to directors were subject to Board review. The Board relied on the credit committee and Whitmore in making its determination. While these normal loan procedures and policies were not followed in all respects with regard to the director stock loans, the loans were nevertheless approved by the credit committee and the Board.

2. *Rollovers of the Loans.*

The Alaskan economy had taken a downturn by the time the loans became due in November 1985. Smith, directed by Whitmore, told Jan Romerdahl ("Romerdahl"), Assistant Vice President of ASB, to roll over the loans and to add an additional $100,000 to some of them. Since Romerdahl had no information on which to base this decision, she prepared only "skimpy" CL-10s, which falsely listed "cash flow" as the source of repayment and did not list the value of the stock. Despite the unusual nature of these CL-10s, the credit committee approved the rollovers and the minutes show that the Board approved them as well. Smith testified before the grand jury that Whitmore engineered this first loan rollover so that the directors would not have to personally pay off their loans.[1]

The directors' loans again became due in 1986. As a result of the continuing slump in the Alaskan economy, the ANBN stock pledged on the loans was now almost worthless.

1. Smith's grand jury testimony was properly admitted as a prior inconsistent statement pursuant to Federal Rule of Evidence 801(d)(1) since Smith recanted his grand jury testimony when he later testified at Whitmore's trial.

Appendix A

One director agreed to sign a new promissory note for an increased sum, although he was not asked to pay off the loan once it became due several months later. The three remaining director stock loans were rolled over for an additional year with another $25,000 added to principal. As with the first rollovers, the only documentation that was provided were CL-10s, which falsely listed the primary source of repayment as "business income" and falsely stated that "this extension allows the customer to maximize his investment."

The FDIC conducted an audit in 1987 and confronted ASB about the problems that it observed. In response to questions by the bank examiners, Smith signed a letter to the FDIC outlining ASB's loan procedures, stating that "none of the loans questioned by the FDIC circumvented [the normal loan] process," and that no preferential treatment had been given to bank insiders. One year later, the FDIC again criticized ASB's failure to collect on these loans and characterized the loans as providing preferential treatment to insiders. Smith's grand jury testimony revealed that the rollovers were used by Whitmore to keep the loans current on the books and to prevent the directors from having to pay interest on the loans.

3. *The 1987 Financial Statements.*

Like other banks, ASB had a loan loss reserve ("LLR") to cover all losses in its loan portfolios as well as other potential losses. If the LLR was understated for any given period, ASB's income would be overstated as it would not accurately reflect the bank's true assets. At ASB, Whitmore had the sole responsibility for determining the LLR and had no formal method of making this determination.

Appendix A

In 1987, Whitmore kept the LLR artificially low in ASB's reports so as to mask the financial difficulties the bank was facing. Despite opposition from ASB officers who refused to sign such falsified financial forms, Whitmore's LLR calculations for 1987 misstated the true financial status of ASB.

4. *The Dividends.*

In 1987, Whitmore caused ASB, whose normal practice was to declare an annual dividend of roughly 25 cents per share, to declare four quarterly dividends of $6.50 per share totaling $2.7 million. In order to facilitate the payout of such large dividends, Whitmore falsely told the Board that such payments were necessary to prevent ASB from being closed by one of its lenders, Mellon Bank. Whitmore also caused several related holding companies to declare dividends of $221,000, $90,000 of which went directly to Whitmore. At the same time that it was declaring dividends, ASB was closing branches and drastically cutting expenses.

5. *Whitmore's Expenses.*

While the bank's reimbursement policy required that only expenses relating to a bank benefit would be approved by the Board, the policy as applied to Whitmore was not followed. Whitmore's expenses, and even those of his family, were paid by ASB before any Board approval was ever obtained. The expenses incurred by Whitmore and his family from 1986 to 1988 included international travel, a $9,500 initiation fee for a Beverly Hills tennis club, and luxury automotive and entertainment expenses. While Whitmore

claimed that these expenses were necessary for making client contacts and for getting new business for ASB outside of Alaska, Whitmore never obtained any foreign investors for ASB and its only customers outside of Alaska were Whitmore and his own attorney.

In 1987, FDIC examiners questioned Whitmore's expenses, especially in light of the financial condition and revenues of ASB. Thereafter, Whitmore directed that certain expenses be excluded from operating expense statements given to the Board. Although the bank paid his expenses totaling $98,650 for 1986, $92,443 for 1987, and $56,870 for 1988, as a result of alterations made by Whitmore, over $35,000 of expenses he incurred between 1987 and 1988 were left unreported.

6. *The California Office (Anchorage Financial Inc.).*

In 1987, Whitmore decided to open an information and transmittal office in Beverly Hills, California, for individuals interested in obtaining loans from ASB. Despite the fact that Whitmore had not discussed this office plan with any other ASB officer, or the fact he had not yet received authorization from California regulators to conduct such business, Whitmore incorporated the office as Anchorage Financial Inc. ("AFI"). Even before Whitmore's plan to establish this office had been approved by the Board of Directors, he had expended ASB funds to furnish the office and had entered into a four-year lease for office space in Beverly Hills. When asked to explain this contract, Whitmore falsely told the Board that California banking authorities required that ASB have an office in California before approval to operate within the state would be given.

Whitmore eventually informed the Board that ASB had not received the necessary approval to operate in California. Rather than closing the office, however, Whitmore decided to treat it as an investment office for ASB. He then had the Board appoint his son as an investment officer. Another son had previously been appointed AFI President. Both sons were assigned by Whitmore to the Beverly Hills office.

In 1988, the FDIC once again criticized ASB's practices, this time with regard to Whitmore's expenditures in relation to AFI. The FDIC thereafter issued an order requiring ASB to close AFI. Although Whitmore stated that the office was no longer in operation, he and his sons continued their business there and ASB continued to make lease payments on the property.

In January 1989, with ASB's closing date less than a month away, Whitmore arranged for an auction of the AFI furnishings and equipment, which had cost ASB approximately $300,000. The auction itself was attended by Whitmore, his family, and ten other potential buyers. At Whitmore's direction, his family and an acquaintance obtained 96% of the auction items for 20% of what ASB had originally paid.

B. Analysis of the Issues on Appeal.

1. *Sufficiency of the Evidence Claims.*

Whitmore challenges the sufficiency of the evidence to support his convictions on the 24 counts. We review claims of insufficient evidence de novo. *See United States v.*

Antonakeas, 255 F.3d 714, 723 (9th Cir. 2001). There is sufficient evidence to support a conviction if, "viewing the evidence in the light most favorable to the prosecution and respecting the jury's ability to judge the credibility of the witnesses, resolve factual conflicts, and draw inferences," any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Castro*, 887 F.2d 988, 994 (9th Cir. 1989); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Where, as here, a claim of sufficiency of the evidence is preserved through a motion for acquittal at the close of the evidence, we review the district court's denial of the motion de novo. *See United States v. Munoz*, 233 F.3d 1117, 1129 (9th Cir. 2000).

a. Sufficiency of Evidence On Bank Fraud Counts.

The seven bank fraud convictions under 18 U.S.C. § 1344 include: Counts 8-10 (rollovers of director stock loans) and Counts 21-24 (dispersal of dividends). A conviction for bank fraud requires that the defendant knowingly (1) engaged in a scheme to defraud a federally chartered or insured financial institution, or (2) participated in a scheme to obtain monies under the custody or control of the federally chartered or insured financial institution by means of materially false statements or representations. *See United States v. Cloud*, 872 F.2d 846, 850 (9th Cir. 1989). A statement or representation is false or fraudulent if it is known to be untrue or is made with reckless indifference to its truth or falsity. *See United States v. Gay*, 967 F.2d 322, 326 (9th Cir. 1992).

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Intent to defraud may be shown by circumstantial evidence, *see United States v. Mason*, 902 F.2d 1434, 1443 (9th Cir. 1990), by the structure of the transactions themselves, *see United States v. Molinaro*, 11 F.3d 853, 857 (9th Cir. 1993), or by proof that the defendant recklessly disregarded a bank's interests, *see United States v. Ely*, 142 F.3d 1113, 1121 (9th Cir. 1998).

i. Counts 8-10: Rollovers of Director Stock Loans.

Any rational trier of fact could have found the essential elements of bank fraud as to the rollovers of the director stock loans. Whitmore's manipulation of bank policy by, among other things, providing false purposes for loan extensions and giving preferential treatment to director loans, was a sufficient basis for the jury to find that Whitmore had the requisite intent for bank fraud. *See Molinaro*, 11 F.3d at 857 (sufficient evidence of intent where jury could infer defendant coordinated and structured transactions to protect himself and conceal his interest). Whitmore was the "architect of the transactions" and intent to defraud could have been inferred from Whitmore's orchestration of these rollovers to protect the prior investments made by the directors. *Id.*

Further, the jury was entitled to rely on Smith's grand jury testimony that the purpose of the rollovers was to protect the directors from personal liability for the loans by making the loans appear current. Such action by Whitmore evidenced a reckless indifference to the bank's interests and his disregard is sufficient to constitute intent to defraud under § 1344. *See Ely*, 142 F.3d at 1121.

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ii. Counts 21-24: Dispersal of Dividends.

The evidence presented to the jury was such that any rational trier of fact could have found the essential elements of bank fraud as to the dispersal of dividends beyond a reasonable doubt. Whitmore lied to the Board by stating that large dividends would be required to keep Mellon Bank from calling its loan and closing ASB. Regardless of what Whitmore's motivations were in requiring such large dividends, the fact that in one year his actions required paying out $2.7 million in dividends at a time of financial crisis for ASB evidences reckless disregard for the interests of the bank itself. *See id.* Such reckless disregard is sufficient to constitute intent to defraud for purposes of a bank fraud conviction. *See id.* ("Neither the openness of the maneuver nor the legal form in which it was dressed remove the stain of fraud if in fact the fiduciaries acted in reckless disregard of the property of [the bank].").

Furthermore, "[the Board's] knowledge, ratification, and consent are not *per se* defenses to the charge [of bank fraud]. Instead these are evidentiary matters that may be considered as part of the defense that there was either no willful misapplication or no intent to injure the bank." *United States v. Unruh*, 855 F.2d 1363, 1368 (9th Cir. 1988) (citation omitted). Given that "[r]eview by the board is a particularly dubious basis for exculpating the [defendant where] the evidence showed that [the defendant] was the moving force behind the board of directors," *id.* at 1368-69, the jury could have properly inferred that the Board's action in approving the dividends was dictated by Whitmore himself and was therefore insufficient to excuse Whitmore's actions.

b. Sufficiency of Evidence On False Entry Counts.

Whitmore also challenges the sufficiency of the evidence underlying his 13 false entry convictions under 18 U.S.C. § 1005. They include Counts 11- 12 (false statements of purpose on CL-10 forms); Count 20 (letter to FDIC denying preferential treatment); Counts 26-33 (false financial statements); and Counts 37-38 (alteration and under-reporting of Whitmore's expenses). A conviction for making false entries in books and records requires that (1) the defendant made or caused to be made, or aided and abetted, a false entry in the books of a federally insured bank, (2) the defendant knew the entry was false when it was made, and (3) the defendant intended to injure or deceive the bank or a public official, such as an officer of the FDIC. *See United States v. Wolf*, 820 F.2d 1499, 1504 (9th Cir. 1987).

i. Counts 11 and 12: False Statements on CL-10s.

We are satisfied that the statements on the CL-10s constituted false entries in violation of § 1005. The CL-10 for the first rollover claimed that "the additional funds are a necessary injection of capital to enable expansion of business enterprises." The reason provided for the second rollover was to "maximize [the borrowers'] investment."

Whitmore insists that because he did not direct that these statements be put on the forms, and because there was no testimony indicating that these actions were taken with the intent to deceive, the evidence was insufficient to convict

him on these counts. However, here, as in *Wolf*, the records for these rollovers were false because they did not reflect the actual purpose of the extension of the loans, which was to keep the loans current to protect the directors from having to personally repay the loans. The jury did not need to find that Whitmore himself made the false entries —" it suffices that he set into motion management actions that necessarily caused" false entries to be made. *Id.* The jury could have reasonably found that he had the requisite intent to deceive based on the evidence that he was trying to conceal the true purpose of the loans and the rollovers from the FDIC.

ii. Count 20: False Entry in FDIC Letter.

The letter written to the FDIC denying preferential treatment constituted a false entry in violation of § 1005. This letter was written in response to an FDIC examination that, among other things, criticized ASB's handling of the director stock loans. Smith testified that the stock loans were indeed preferential in the way they were created and in the way they were handled. Based on such evidence, the jury could have reasonably concluded that Whitmore, through his direction and control, caused the false statement to be made in the letter to the FDIC in order to conceal the true nature of the director stock loans.

iii. Counts 26-33: False Financial Statements.

The financial statements prepared by Whitmore also constituted false entries in violation of § 1005. Whitmore kept the Loan Loss Reserves artificially low in financial reports so as to mask the financial difficulties that ASB was

facing. By making such false entries, he intentionally misrepresented the status of ASB to the FDIC and to the public. Although Whitmore presented some evidence suggesting that his calculations were not in error, viewing the evidence in the light most favorable to the prosecution, the jury could have reasonably found that the understated financial statements did constitute false entries in violation of § 1005.

iv. Counts 37 and 38: Alteration and Under-Reporting of Expenses.

The alteration and the under-reporting of Whitmore's expenses constituted false entries in violation of § 1005. Testimony at trial revealed that ASB officials were ordered to change the procedures for handling expense accounting and to make changes to the expense summaries to under-report amounts actually expended. This evidence, in addition to the evidence of Whitmore's control over ASB procedures and policy, was sufficient to allow the jury to reasonably infer that Whitmore "set into motion management actions that necessarily caused" false entries and omissions to be made on the expense reports. *Id.*

c. Sufficiency of Evidence on Misapplication Counts.

The four misapplication convictions under 18 U.S.C. § 656 include: Counts 34-36 (misapplication of bank funds to Whitmore's personal use) and Count 39 (misapplication of bank funds in relation to AFI). A conviction for misapplication of funds requires that (1) the defendant was

an officer, employee or director, (2) of a federally insured bank, and that (3) the defendant acted with intent to injure or defraud, (4) by willfully misapplying the funds of the bank. *See United States v. Wolfswinkel*, 44 F.3d 782, 786 (9th Cir. 1995). Intent to injure can be shown where the defendant intended to deceive bank officials, bank examiners, or the FDIC. *See Wolf*, 820 F.2d at 1503. Willful misapplication can be proven by showing that "funds were disbursed from the bank under a false pretense designed to deceive." *Wolfswinkel*, 44 F.3d at 786.

i. Counts 34-36: Misapplication for Personal Use.

Whitmore's personal use of bank funds constituted misapplication in violation of § 656. Smith testified that there was no valid business justification for the expenses incurred by Whitmore for, among other things, international travel, automotive expenses, and in joining a tennis club in Beverly Hills. Although Whitmore argued that these activities were necessary to "make contacts" for the benefit of ASB, no such contacts were ever made. The jury could have inferred from this evidence that Whitmore intended to deceive bank and regulatory officials as to the true purpose of his expenditures and therefore had the requisite intent to injure under § 656. *See Wolf*, 820 F.2d at 1503.

The jury could have also properly inferred that Whitmore willfully misapplied these funds. Since the bank provided Whitmore with the necessary funds based on his representations that they were being expended for the benefit of ASB, when in fact no such benefit was ever shown, the

jury properly inferred that "funds were disbursed from the bank under a false pretense designed to deceive." *Wolfswinkel*, 44 F.3d at 786.

ii. Count 39: Misapplication as to AFI.

Whitmore's use of bank funds to establish and operate AFI constituted misapplication in violation of § 656. Whitmore spent roughly $300,000 to furnish and lease property for AFI's office without ever having received State approval for such an office. Further, ASB had no clients or business in California.

The jury could have also properly determined that Board approval was a "dubious basis for exculpating the [defendant where] the evidence showed that [the defendant] was the moving force behind the board of directors." *Unruh*, 855 F.2d at 1368-69. Given that such large expenditures were made at a time when ASB was on the verge of financial collapse, the jury properly inferred that "funds were disbursed from the bank under a false pretense designed to deceive," *Wolfswinkel*, 44 F.3d at 786, and that Whitmore therefore misapplied bank funds in creating AFI.

2. *Government's Cross-Appeal Based on Improper Sentencing Departures.*

On cross-appeal, the government challenges Whitmore's sentence based on its contention that the district court improperly departed downward. We review the district court's decision to depart from the Sentencing Guidelines for an abuse of discretion. *See Koon v. United States*, 518 U.S. 81,

99-100 (1996); *United States v. Caperna*, 251 F.3d 827, 830 (9th Cir. 2001). The abuse of discretion standard requires this Court to "uphold any district court determination that falls within a broad range of permissible conclusions." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990). As long as the "district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse." *United States v. Working*, 224 F.3d 1093, 1102 (9th Cir. 2000) (en banc) (citation omitted).

Under the U.S.S.G., a district court may depart from the guideline range where the court finds the existence of "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (2001). With the exception of the factors listed in the guidelines as improper bases for departure, sentencing courts have discretion to determine what factors warrant departure in a particular case. *See Caperna*, 251 F.3d at 830. Downward departures are permitted in "an atypical case where the language of the guideline is applicable but where the defendants's conduct differs significantly from the norm or the 'heartland' of cases addressed by the guideline." *Working*, 224 F.3d at 1099.

In *Koon*, the Supreme Court significantly curtailed appellate review of departure decisions. In doing so, the Court noted that although "Congress was concerned about sentencing disparities, [ ] we are just as convinced that Congress did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over

district court sentencing decisions . . . A district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." *Koon*, 518 U.S. at 97-98.

As *Koon* and other cases have made clear, "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." *Koon*, 518 U.S. at 97 (internal quotations omitted); *Solem v. Helm*, 463 U.S. 277, 290 n.16, (1983). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

Thus, we are required to accord substantial deference to most departure decisions of the district court. As we have stated on previous occasions, "district courts are accorded such deference because they 'have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do.' " *Working*, 224 F.3d at 1099 (citing *Koon*, 518 U.S. at 98). "District courts are 'particularly suited' in determining whether a factor makes a case unusual, because they are 'informed by [their] vantage point and day-to-day experience in criminal sentencing.' " *United States v. Aguirre*, 214 F.3d 1122, 1127 (9th Cir.) (citing *Koon*, 518 U.S. at 98), *cert. denied*, 531 U.S. 970 (2000).

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The district court found that the guidelines were applicable to the director stock loans as well as the false financial statement convictions. After initially determining that the appropriate guideline offense level was 23, subjecting Whitmore to a guideline range of 46-57 months, the district court granted a downward departure of seven levels on four different bases and thus sentenced Whitmore to 24-months concurrent on all counts. The district court did not abuse its discretion in granting these departures.

a. Two Level Downward Departure Because Case was Atypical.

At sentencing, the district judge determined that because "this defendant's conduct, although considered reckless by the trial jury, was really motivated by his desire to save the Alaska Statebank rather than destroy it," the case fell outside of the heartland of bank fraud cases and therefore a two level downward departure was warranted. The district court stated that "this is not your average, typical bank fraud," and that "what was going on at the Alaska Statebank was from the beginning to end an effort to enhance the bank and in the end a desperate effort to save it."

Based on the evidence presented throughout the trial and at sentencing, and the court's extensive experience with the numerous Alaska Statebank civil and criminal fraud prosecutions, the district court could have permissibly concluded that "this case is out of the mainstream of bank frauds" and that "the effort that was underway here was to — was to salvage the bank — to save it, not destroy it." Although an alternative conclusion based on the evidence

presented is plausible, where, as here, there are two permissible views of the evidence, "the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 573-74. Especially given the high degree of deference accorded departure decisions of district courts, "we will not second guess the district court's determination that this case involved an unusual [ ] situation." *Aguirre*, 214 F.3d at 1127.

b. Two Level Downward Departure Because of Age and Infirmity.

Whitmore was 67 years old at the time of sentencing and suffered from a number of infirmities, including — coronary artery disease, and vulnerability to various infections. Although acknowledging that Whitmore's physical situation did *not* amount to an "extraordinary" situation meriting departure, the district court departed downward two levels finding that "given the defendant's age combined with [his] infirmities, I believe that a sentence of forty-six to fifty-seven months is unduly harsh, it is far more punitive than that same sentence would be on a person of middle age." The district court did not abuse its discretion in making this decision.

The district court correctly noted that because of its finding that Whitmore's physical condition was not extraordinary, departure based on ordinary physical ailments would not qualify as adequate grounds for departure. *See* U.S.S.G. § 5H1.4 (1988) (physical condition usually not relevant in determining whether departure is appropriate, but existence of an extraordinary physical impairment may be reason to downward depart). However, the Sentencing

Guidelines provided that age may be a basis for downward departure where the defendant is elderly and infirm and where other forms of punishment would be equally efficient. *See* U.S.S.G. § 5H1.1 (1988). Thus, although in most cases age is not a basis for downward departure, the district court's decision in this case that age, in combination with Whitmore's disabilities, warranted such a departure was not an abuse of discretion.

c. Two Level Downward Departure Because Whitmore was Deprived of Professional Livelihood.

The district court found that because Whitmore was "deprived of his professional livelihood," an additional two level downward departure was warranted. The court determined that "as a consequence of the failure of Alaska Statebank and the institution of these charges some six years ago, the defendant, for all practical purposes, was deprived of his professional livelihood." The "very slow development" of the case against Whitmore "didn't just cost Mr. Whitmore his job at Alaska Statebank, it cost him his profession." According to the court, Whitmore lost what could have been "the six to eleven most productive years of his life as far as earning capacity." The court granted a two level downward departure, concluding that this destruction of "professional capacity" and "ordinary livelihood" constituted "a pretty serious punishment already inflicted and carried out . . . and one that's likely to be permanent."

With the exception of the factors listed in the Guidelines as improper bases for departure, sentencing courts have

discretion to determine what factors warrant departure in a particular case. *See Caperna*, 251 F.3d at 830. In *Koon*, a case involving the "willful violations of rights under color of law" by several police officers, the Supreme Court held that the district court had abused its discretion in partially basing its departure decision on the collateral employment consequences that the police officers would suffer as a result of their convictions. *Koon*, 518 U.S. at 110. Although the Court concluded that "it is not unusual for a public official who is convicted of using his governmental authority to violate a person's rights to lose his or her job and to be barred from future work in that field," the Court refused to categorically exclude the effect of conviction on a career as a possible basis for departure. *Id.*

The district court in this case felt departure was warranted not only because of the potential employment consequences that Whitmore would face as a result of his conviction, but also because of the employment consequences he had already suffered as a result of the "slow development" of the case against him. The prosecution had been instituted over six years before the completion of the trial and Whitmore was deprived of his "professional livelihood" during that entire period. Given that district courts are " 'particularly suited' in determining whether a factor makes a case unusual because they are informed by [their] vantage point and day-to-day experience in criminal sentencing," *Aguirre*, 214 F.3d at 1127 (citing *Koon* at 98), the district court did not abuse its discretion in determining that the "particular circumstances" of this case warranted a downward departure, *Koon*, 518 U.S. at 109.

d. One Level Downward Departure Because of Potential For Harsher Confinement Based on Needs of Medical Condition.

The district court departed downward one level based on its finding that, because of the need to accommodate Whitmore's infirmities, "incarceration of Mr. Whitmore is most likely to take place in a federal medical facility of a substantially higher degree of confinement and security than . . . he would be subject to were he well." While the district court found that, based on his convictions and sentence, Whitmore would likely be incarcerated "at the lowest type of security facility . . . of the Bureau of Prisons," it concluded that it had "serious doubts that — that his medical situation . . . can or would be adequately taken care" of in the type of facility that he would have been sent to.

Although evidence in the record could have supported the conclusion that the Bureau of Prisons had the staff and facilities to accommodate Whitmore's conditions at an institution commensurate with his security considerations, the district court's "vantage point and day-to-day experience" with the particularities of this case and with sentencing under the guidelines support our holding that the district court's decision is plausible in light of the record viewed in its entirety. The district court thus did not abuse its discretion in departing downward one level on this basis.

Appendix A

III. DEFENDANT SMITH

A. Factual Background.

1. *The Vozar Loan.*

Derrell H. Smith was President of ASB and a member of its Board of Directors. Smith was in need of a personal loan in the sum of $285,000, $200,000 of which he borrowed legally from ASB. For the remainder, Smith obtained a "nominee loan" from ASB through his friends and customers, the Vozars. A nominee loan is a loan made in the name of another that hides the true borrower's beneficial interest in the loan. *See Wolf*, 820 F.2d at 1501. The loan application submitted by Sandra Vozar stated that the purpose of the loan was "working capital for real estate investments" when in reality the purpose was to give the funds directly to Smith. Although the loan papers made no reference to Smith's involvement with the loan, Smith claims that bank officials knew that he was the true beneficiary of the loan. Once the loan was approved, Sandra Vozar forwarded the full amount of the loan to Smith. All repayments on the loan came from Smith through another bank.

2. *The Proffer and Plea Agreement.*

In the course of the FBI investigation of ASB, the Bureau obtained several examination reports. Included were an FDIC "write-up" of the Vozar nominee loan, documents in support of that report, and all of the exhibits later presented to the grand jury. During this period, the FBI also interviewed all of the witnesses who later testified at trial.

After Smith's first trial ended with a hung jury as to most of the counts against him, the parties entered into a proffer agreement in 1994. A June 1994 letter memorialized the government's intention to offer a plea to two counts based on Smith's cooperation under the proffer. Smith agreed to the terms of an amended proffer and was debriefed by the government over a five-day period. Thereafter, Smith entered into a plea agreement with the government that provided "[t]he parties agree that any statements or information provided . . . pursuant to the defendant's cooperation under this agreement, and any evidence derived therefrom, shall not be used against the defendant in any criminal proceeding." However, the government agreed to delay the filing of the plea agreement until the final indictment against Smith had been returned. Smith testified for roughly two days before the grand jury and provided some testimony regarding the Vozar loans.

Before the government filed the plea agreement with the court, Smith reneged on the plea agreement and was indicted with the other directors. Before trial, Smith successfully moved to sever the Vozar loan counts from the other counts on which he had been indicted.

3. *Immunized Testimony at Whitmore Retrial.*

The government dismissed all counts against Smith, except the two Vozar loan counts, when Smith gave compelled testimony at Whitmore's retrial in 1999 under a grant of statutory immunity. *See* 18 U.S.C. § 6002. During his testimony, Smith recanted nearly every statement that he

had made at the grand jury five years earlier. No questions were asked of Smith concerning the Vozar loan during the retrial.

4. *Kastigar and Zielezinski Hearings.*

Prior to his own trial, Smith filed a motion challenging the use of his immunized trial testimony under *Kastigar v. United States*, 406 U.S. 441 (1972).[2] The government provided affidavits listing its evidence and the independent sources of that evidence. Smith then filed a motion to dismiss the indictment under *United States v. Zielezinski*, 740 F.2d 727 (9th Cir. 1984), based on the fact that the same grand jury that had heard his grand jury testimony had also indicted him.[3] Smith argued that because his failed plea agreement was introduced to the grand jury during his testimony, the entire proceeding against him was thus tainted. The government responded with additional affidavits and exhibits. The district court held a hearing on both motions on March 23, 2000, and required all relevant parties to be available for examination and cross-examination.

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2. Under *Kastigar*, 406 U.S. at 460, the government is required to prove, by a preponderance of the evidence, that "the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

3. Under *Zielezinski*, 740 F.2d at 733-34, where the same grand jury that hears a person's immunized testimony then indicts that person, a *Kastigar*-style hearing is required to determine whether grounds for the indictment independent of the immunized testimony exist.

As to Smith's *Kastigar* claim, the court stated that the government had made the necessary showing that Smith's immunized trial testimony was not used to assist the development of the case against Smith and that the government had independent evidentiary sources for Smith's case. The court found that the government had independent sources for the indictment, as well as for the case against Smith, based on the FDIC inquiry into ASB, bank documents, and FBI interviews of bank employees that occurred before Smith was ever approached.

As to Smith's *Zielezinski* claim, the court rejected Smith's argument that the grand jury's indictment was tainted since, among other things, the government had established an independent source of evidence for the indictment and the testimony was given over seven months before the indictment was handed down. Although the district court noted that the government had not warned the grand jury against using Smith's immunized testimony in making its determination, the court concluded that it was "[u]npersuaded by the evidence before [it] that the government's conduct in this case [in] any way threatened the integrity of the grand jury process."

B. Analysis of the Issues on Appeal.

1. *Smith's Claims Regarding the Plea Agreement.*

Smith contends that the district court erred when it failed to find that the plea agreement superceded the prior letter-form proffer agreement or granted retroactive derivative use immunity to statements made under that proffer. We review

the district court's interpretation of the terms of a plea agreement for clear error, but the application of legal principles involved in this interpretation is reviewed de novo. *See United States v. Anthony*, 93 F.3d 614, 616 (9th Cir. 1996). Findings regarding the terms of a plea agreement are subject to the clearly erroneous standard of review. *See United States v. Clark*, 218 F.3d 1092, 1095 (9th Cir.), *cert. denied*, 531 U.S. 1057 (2000).

The district court held that "the government's rights under the proffer agreement . . . survived the failure of the plea agreement." The court reasoned that "the government would have been within its rights to use the proffer information after the plea agreement failed, because the proffer . . . specifically contemplated the possibility that there might not be a plea agreement."

The proffer agreement stated that "[t]he government may make derivative use of, and may pursue, investigative leads suggested by the statements made by Mr. Smith." After the proffer debriefing, the government and Smith entered into a subsequent plea agreement which provided that "[t]he parties agree that any statements or information provided . . . pursuant to the defendant's cooperation under this agreement, and any evidence derived therefrom, shall not be used against the defendant in any criminal proceeding." The district court did not clearly err in finding that the government's rights under the proffer were not extinguished and in finding that Smith's statement under the proffer were not given retroactive immunity.[4]

4. Smith contends that the district court erred in finding that the government did not make derivative use of the proffer. Regardless (Cont'd)

First, the plea agreement did not supercede the original proffer agreement. The plea agreement in this case failed as a result of Smith's decision not to abide by his plea bargain. In the end, Smith chose *not* to enter into a binding plea agreement with the government — he was indicted with the other defendants. While Smith points to *United States v. Thornton*, 197 F.3d 241, 253 (7th Cir. 1999), to support his claim that "proffer letters . . . seem of scant relevance at trial when a subsequent, superceding plea agreement has been reached," Smith fails to realize that the *Thornton* court was addressing the relevance of proffer letters in relation to *successful* plea agreements. Because the plea agreement in the case at bar did not survive, it could not "supercede" any other agreements.

Second, while ambiguities in plea agreements should be construed in favor of the defendant, *see United States v. De la Fuente*, 8 F.3d 1333, 1338 (9th Cir. 1993), there was no language in the plea agreement dictating or even inferring that such retroactive use immunity would apply. As we stated in *United States v. Lipkis*, 770 F.2d 1447, 1450 (9th Cir. 1985), "[a]bsent a specific grant by the United States Attorney, the statements lack immunity as a matter of law."

Here, the plea agreement which the government offered Smith did not grant immunity to statements made under the proffer — rather, it stated that information provided "pursuant to the defendant's cooperation" with the plea agreement

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(Cont'd)
of whether statements from the proffer were actually used in this way, the government had the authority under the proffer agreement to do so. Smith's claim is thus without merit.

would not be used against the defendant in any criminal proceeding. Clearly, information received as a result of the proffer, *before* the plea agreement was even created, was not provided "pursuant to" the subsequent plea agreement. Thus, the district court did not clearly err in determining that retroactive immunity did not apply to the proffer.

2. *Smith's Claims Regarding the Improper Use of Immunized Testimony.*

Smith claims that the district court erred in finding that the government did not improperly use Smith's grand jury and immunized trial testimony in preparing its case against him. We review a district court's finding that the government has established an independent source for its evidence for clear error. *See United States v. Crowson*, 828 F.2d 1427, 1429 (9th Cir. 1987). The district court's decision that the government had established an independent source for the evidence used at Smith's trial was not clearly erroneous.

Smith was granted formal use immunity for his testimony under 18 U.S.C. § 6002, which proscribes both the direct and indirect use of any information obtained during compelled testimony against the person giving that testimony. *See United States v. Mapelli*, 971 F.2d 284, 287 (9th Cir. 1992). "This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing the investigation on a witness as a result of his compelled disclosures." *Kastigar*, 406 U.S. at 460. Under *Kastigar*, the government is required to prove, by a preponderance of the evidence, that

"the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.* "This court has permitted the government to meet its burden of proof as to the existence of independent, prior sources through affidavits." *United States v. Montoya*, 45 F.3d 1286, 1292 (9th Cir. 1995) (citing *Crowson*, 828 F.2d at 1429).

The district court held a hearing on this matter, as required under *Zielezinski,* at which the government presented affidavits and documentary exhibits, and at which its attorneys and other witnesses were available for examination. The government's witnesses stated through affidavits that because of the ongoing investigation into this matter, all of the documents and witnesses that it was planning to use against Smith had been obtained before Smith provided any immunized testimony. In fact, the evidence had been obtained even before the government had approached Smith about the initial proffer. The government further stated that it determined what evidence and witnesses would be needed based on the face of the documents themselves.

Rather than providing solely conclusory statements denying use of the immunized evidence, *see Montoya*, 45 F.3d at 1292 (good faith allegation that the evidence is not the fruit of immunized testimony is not sufficient), these affidavits retraced the investigation and showed what information had been obtained from the FDIC investigation and interviews with bank employees before Smith was ever approached. Based on this evidence, the district court did not clearly err in finding that the government had met its burden of proof on this issue. *See, e.g.*, *Crowson*, 828 F.2d at 1430-31 (documents, as well as fact that investigation into

substantive offenses had been substantially completed by the time of immunized testimony, supported court's finding of prior independent source for evidence); *Montoya*, 45 F.3d at 1295 (declarations filed by government that provided details of investigation based on prior information were sufficient to support showing of independent sources).

Smith further contends that the district court's finding was erroneous based on the admission of a government prosecutor that she had "digested" Smith's grand jury testimony. "The focus of the inquiry under *Kastigar* . . . is not whether the prosecutor was aware of the contents of the immunized testimony, but whether he used the testimony in any way to build a case against the defendant." *Crowson*, 828 F.2d at 1430. While it may be true that the government officials involved in Smith's trial were aware of statements made during the immunized testimony, their affidavits and exhibits at the hearing adequately demonstrated that the evidence they were using was derived from sources independent of such testimony.

Thus, the government satisfied its burden by establishing independent sources for the evidence used against Smith. Indeed, the prosecutor noted that since Smith had not testified at Whitmore's trial about the Vozar loans, the only counts on which he was being tried, she could not "even think of how [she] could use [that testimony] to obtain evidence that would be admissible in the nominee loan trial."

3. *Smith's Claim that the Indictment Was Tainted.*

Smith claims that the district court erred by finding that the indictment was not tainted by use of the same grand jury to indict him that had heard his immunized testimony and in finding that credibility concerns were not relevant to this question. We review for clear error a district court's finding that the government's sources of evidence were independent of the defendant's immunized testimony. *See id.* at 1429.

In *Zielezinski*, 740 F.2d at 733-34, we declined to establish a *per se* rule prohibiting a grand jury from indicting any witness who had testified before it. Instead, we held that when the same grand jury that hears a person's immunized testimony then indicts that person, a *Kastigar*-style hearing is necessary to determine the independent grounds of the indictment. "[A] good faith allegation that the evidence is not the fruit of immunized testimony is not sufficient; the Government must show how it acquired all of the evidence." *Montoya*, 45 F.3d at 1292 (citing *Block v. Consino*, 535 F.2d 1165, 1169 (9th Cir. 1976)). The government presented sufficient evidence to satisfy this burden.

The government's affidavits, exhibits, and testimony at the pre-trial hearing showed by a preponderance of the evidence that the information it used to indict, as well as to try, Smith had been obtained prior to and independent of the grand jury testimony. The court found that "the government had access and had in hand before the immunized testimony the results of an FDIC inquiry. They had bank documents. They had the benefit of interviews with other bank employees, and they had the benefit of one or more interviews

with [the Vozars]." Smith had an opportunity at the hearing to contest this proof and to offer his own evidence to the contrary. The evidence sufficiently showed how and from where the government acquired its evidence. *See Block*, 535 F.2d at 1169.

Presenting to a new grand jury is best where feasible, but a strong cautionary admonition not to consider immunized testimony must always be given when the same grand jury must be used. Thus, while the United States Attorney should admonish the grand jury not to use a witness's immunized testimony when deciding whether to return an indictment against that individual, the district court did not clearly err in determining on this record that Smith's indictment was not tainted given the circumstances and timing of the indictment in this case. As the court noted, in this case it was "improbable that the federal grand jury had Mr. Smith's immunized testimony in mind when it determined to indict him," because, among other things, the immunized testimony was given over seven months prior to the indictment.

Further, the district court did not err in finding that *Zielezinski* did not require it to dismiss an indictment where the witness' credibility may have become an issue, as long as there was an independent evidentiary basis to support the indictment. The focus of *Zielezinski* is to protect the integrity of the judicial process by ensuring that the prosecutors rely on independent, non-immunized sources in pursuing their cases. *See Zielezinski*, 740 F.2d at 733-34. Although we stated in *Zielezinski* that an "assessment of credibility can taint an indictment," *id.*, we have never held that the potential

existence of a negative credibility assessment requires dismissal of an indictment. This is especially so where the record does not even suggest that the grand jury's decision was based on an assessment of Smith's credibility. The district's court's decision not to dismiss the indictment on this basis was not clearly erroneous. *See United States v. Zielezinski*, 756 F.2d 1448 (9th Cir. 1985) (on appeal after remand, holding district court did not clearly err in upholding conviction where no evidence in record that grand jury's decision was based on credibility assessment).

4. *Smith's Claim Regarding Disclosure of the Grand Jury Transcript.*

Smith contends that the district court erred in refusing to allow disclosure of Special Agent Henderson's entire grand jury transcript. Although the government had already provided Smith with all of the FBI agent's testimony relevant to the counts with which Smith was charged, Smith contends that the remainder of the transcript was necessary to prove that the government had used his immunized testimony and to prove that his credibility had been attacked during the grand jury proceedings.

We review a district court's decision regarding the release of grand jury transcripts for an abuse of discretion. *See United States v. Plummer*, 941 F.2d 799, 806 (9th Cir. 1991) (citing *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223 (1979)). The district court may release grand jury transcripts, and thus "lift the secrecy of grand jury proceedings," if it determines (1) that the desired material will avoid a possible injustice, (2) that the need for disclosure

is greater than the need for continued secrecy, and (3) that only the relevant parts of the transcript will be disclosed. *Id.* Disclosure should be ordered only where the party seeking the transcripts has demonstrated that a "particularized need exists . . . which outweighs the policy of secrecy." *United States v. Walczak*, 783 F.2d 852, 857 (9th Cir. 1986); *Dennis v. United States*, 384 U.S. 855, 870 (1966). This standard of particularized need is narrowly applied to insure that only relevant grand jury testimony is made available to defense counsel. *See United States v. Kim*, 577 F.2d 473, 478 (9th Cir. 1978).

In *Plummer*, 941 F.2d at 806, we held that the district court did not err when it refused to disclose the entire grand jury transcript to the defendant for purposes of determining whether the government had breached its immunity agreement. We concluded that by providing the defendant with the parts of the transcript relevant to his claims, the district court properly balanced the defense need for the testimony with the need to preserve the secrecy of grand jury proceedings.

Here, the government had provided Smith with all of Agent Henderson's testimony on the two counts on which he was being tried. Since the district court had determined that credibility was not the relevant consideration under *Zielezinski*, and since the relevant portions of the transcript had already been provided to Smith, the district court's determination that Smith's need for the full transcript did not outweigh the need to protect the secrecy of the proceedings was not an abuse of discretion.

Appendix A

5. *Smith's Claims Regarding Excluded Witness Testimony.*

Smith contends that the district court erred in refusing to admit the testimony of Ron Brown ("Brown"), his only witness, to impeach the testimony of a government witness, ASB Vice-President, Margaret Oldham ("Oldham"). Smith argues that Brown's testimony was necessary to impeach Oldham, who had testified she did not know until after ASB had closed that the proceeds of the Vozar loan went to Smith. The defense proferred that Brown, Oldham's replacement at ASB, would testify that sometime between 1987 and the closing of ASB in 1989, Oldham had told Brown that the proceeds of the Vozar loan had been disbursed to Smith. Smith claims that this testimony was relevant to his defense that ASB was aware that he was the true beneficiary of the loan.

We review the district court's evidentiary ruling for an abuse of discretion. *See United States v. Murillo*, 255 F.3d 1169, 1174 (9th Cir. 2001). The district court ruled that Brown's testimony was inadmissible because Smith had failed to lay the proper foundation as required under Federal Rule of Evidence 613(b).[5] The court ruled that the defense

5. Federal Rule of Evidence 613(b) provides in relevant part:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

had not given Oldham "a sufficiently specific opportunity to recall what it is you're going to zing her on through another witness, as in asking, didn't you talk to Ron Brown about this situation." Smith's attorney had simply reaffirmed that Oldham did not know that the proceeds of the Vozar loan were going to Smith and then asked, "So between March 1987 and when the bank closed in February of '89, you never told anybody in the bank that you knew that the loan proceeds went to Mr. Smith?" Oldham replied, "No." Oldham was excused shortly thereafter.

The foundational prerequisites of Rule 613(b) require only that the witness be given an opportunity, at some point, to explain or deny the prior inconsistent statement and that the opposing party be given the opportunity to examine the statement. *See United States v. Young*, 86 F.3d 944, 949 (9th Cir. 1996); *United States v. McLaughlin*, 663 F.2d 949, 953 (9th Cir. 1981). In *Young*, 86 F.3d at 949, we reversed the district court's determination that, because the defense had not *first* provided the witness with an opportunity to explain the inconsistent statement, the foundational prerequisites of Rule 613(b) had not been satisfied. While the initial questioning of the witness had not afforded the witness an adequate opportunity to explain the statement, the government would have been free to re-call the witness and "give him an additional opportunity to explain or deny the statement attributed to him." *Id.* Similarly, in *McLaughlin*, 663 F.2d at 953, we held that the foundational requirements of Rule 613(b) had been satisfied where the witness was reminded during his initial examination of the time, place, and persons present at the time the prior inconsistent

statement was made, and where the government would have been free to re-call the witness and give him an additional opportunity to explain the statement.

Smith's case can be distinguished from *Young* and *McLaughlin*. In both cases, we concluded that the foundational prerequisites were satisfied where the government could have re-called the witness to explain or deny the prior inconsistent statement. *See Young*, 86 F.3d at 948; *McLaughlin*, 663 F.2d at 953. This was not an option for the government in this case. Oldham, who did not even live in Alaska, had been excused and flew home before Brown had been called to the stand. Neither Oldham nor the government was given an adequate opportunity to explain or examine the statement under these circumstances. The district court therefore did not abuse its discretion in disallowing the testimony of Brown.

Smith further contends that the statements should have been admitted under *Federal Rule of Evidence 404(b)* as evidence that Oldham, a member of the Board, knew that Smith was the true recipient of the loans. Smith contends that proof of such knowledge could negate the fraudulent intent required for the misapplication charge.

Federal Rule of Evidence 402 provides that "[e]vidence that is not relevant is not admissible." Smith concedes that knowledge or consent by the Board does not constitute a defense to the charge of making a false statement. Therefore, evidence of Oldham's knowledge would not be relevant to that count. *See United States v. Blumenthal*, 945 F.2d 280, 284 (9th Cir. 1991). Further, "[the Board's] knowledge,

ratification, and consent are not *per se* defenses to the charge [of misapplication]. Instead these are evidentiary matters that may be considered as part of the defense that there was either no willful misapplication or no intent to injure the bank." *Unruh*, 855 F.2d at 1368.

The district court properly considered Smith's position, his involvement in and control over the loan processes, the fact that Oldham's statement may not have been made, if at all, until after the loan had been approved, and the fact that "[r]eview by the board is a particularly dubious basis for exculpating the [defendant where] the evidence showed that [the defendant] was the moving force behind the board of directors." *Id.* It did not abuse its discretion in refusing to admit the testimony of Brown to show that Oldham, one member of the Board of Directors, may have known the true purpose of the Vozar loans.

IV. CONCLUSION

The convictions and sentences of Ralph E. Whitmore, Jr. and H. Derrell Smith are **AFFIRMED.**

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR PANEL HEARING AND PETITION FOR REHEARING ARE DENIED DATED AND FILED APRIL 23, 2002

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 00-30152
00-30183

D.C. No. CR-94-00136-HRH

UNITED STATES OF AMERICA,

Plaintiff-Appellee/
Cross-Appellant,

v.

RALPH E. WHITMORE, JR.,

Defendant-Appellant/
Cross-Appellee.

ORDER

Before: REAVLEY,* B. FLETCHER, and TALLMAN, Circuit Judges.

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* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Appendix B

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX C — RELEVANT STATUTES

18 USCS § 656 (2002)

§ 656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act, or a receiver of a national bank, insured bank, branch, agency, or organization or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or holding company, branch, agency, or organization or any moneys, funds, assets or securities intrusted to the custody or care of such bank or holding company, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

Appendix C

18 USCS § 1005 (2002)

§ 1005. Bank entries, reports and transactions

Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act, without authority from the directors of such bank, branch, agency, or organization or company, issues or puts in circulation any notes of such bank, branch, agency, or organization or company; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

Whoever makes any false entry in any book, report, or statement of such bank, company, branch, agency, or organization with intent to injure or defraud such bank, company, branch, agency, or organization, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, company, branch, agency, or organization, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, company, branch, agency, or organization, or the Board of Governors of the Federal Reserve System; or

Appendix C

Whoever with intent to defraud the United States or any agency thereof, or any financial institution referred to in this section, participates or shares in or receives (directly or indirectly) any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such financial institution —

Shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a member of one of the Federal Reserve banks; "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation; and the term "branch or agency of a foreign bank" means a branch or agency described in section 20(9) of this title. For purposes of this section, the term "depository institution holding company" has the meaning given such term in section 3(w)(1) of the Federal Deposit Insurance Act 12 USCS § 1813(w)(1).

Appendix C

18 USC § 1344

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice —

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

FILED
OCT 24 2002
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No. 02-126

In the Supreme Court of the United States

RALPH E. WHITMORE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to establish the intent element of petitioner's bank fraud convictions.

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02-126

RALPH E. WHITMORE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a-42a) is not published in the *Federal Reporter*, but is reprinted at 35 Fed. Appx. 307.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2002. A petition for rehearing was denied on April 23, 2002 (Pet. App. 43-44a). The petition for a writ of certiorari was filed on July 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Alaska, petitioner was con-

victed of seven counts of bank fraud, in violation of 18 U.S.C. 1344; 13 counts of making false entries in bank books and records, in violation of 18 U.S.C. 1005; and four counts of misapplication of bank funds, in violation of 18 U.S.C. 656. He was sentenced to 24 months of imprisonment, to be followed by two years of supervised release. The court of appeals affirmed petitioner's convictions and sentence.

1. Petitioner was the controlling shareholder, Chairman of the Board, and Chief Executive Officer of Alaska Statebank (ASB), a state chartered and federally insured bank headquartered in Anchorage, Alaska. He also owned ASB's two holding companies. As a result, he exerted considerable control over the bank's management, including decisions about the issuance of loans and dividends. Pet. App. 2a-3a, 5a; Gov't C.A. Br. 6.

a. In 1984, petitioner presented the ASB Board of Directors with a plan to acquire the Alaska National Bank of the North (ANBN) and merge it into ASB. He told the directors that ASB could not legally purchase ANBN directly, but that ASB could loan each of the directors sufficient funds to purchase ANBN stock and pay interest and expenses. Petitioner assured the directors that they would not be personally responsible for repaying the loans. Pet. App. 5a; Gov't C.A. Br. 7.

Each of the four directors received a $350,000 loan secured by ANBN stock and a $150,000 unsecured loan (the director loans). Petitioner caused the directors to sign letters falsely stating that the loans were personal investments, and that there was no agreement for the bank or its holding companies to indemnify the directors from market risk associated with ownership of the shares. Petitioner subsequently used the loan proceeds to purchase ANBN stock, and the directors

pledged control over the stock to petitioner. Pet. App. 5a; Gov't C.A. Br. 8-9.

In November 1985, when the director loans came due, the Alaskan economy had taken a downturn. No payments were made on the loans. In order to prevent the loans from appearing to be in default, petitioner directed H. Derrell Smith, the President of ASB, to instruct the bank executive responsible for the loans to roll them over and to add $100,000 to some of them. The bank executive had no information on which to base the rollovers, and she prepared only "skimpy" credit cover sheets (CL-10s), Pet. App. 6a, which she then refused to sign. The CL-10s, which were the only documentation supporting the loan rollovers, falsely listed the source of the loan repayment as "cash flow," and they did not indicate the value of the ANBN stock. Despite the fact that the loan file had no supporting information, the credit committee approved the rollovers, and minutes from the Board indicate that it approved the loans as well. Smith testified before the grand jury that petitioner "engineered" the loan rollovers so that the directors would not themselves have to repay the loans. *Ibid.*; Gov't C.A. Br. 11-12.

One of the directors refused to sign the new note, and the bank did not attempt to collect on the defaulted loan. After about a year, the director finally agreed, at Smith's urging, to sign a note that increased the unsecured loan by $50,000. No paperwork supported the new loan. Gov't C.A. Br. 13-14.

In December 1986, the loans to the other three directors were again due. The Alaskan economy had worsened, the ANBN stock that served as collateral was worthless, and the directors lacked the resources to repay the loans. Nonetheless, the loans were rolled over with $25,000 added to the principal. Petitioner

submitted the loans to the Board without documentation, and the CL-10s were created several days later. As with the first rollover, the CL-10s were fraudulent: they falsely listed the primary source of repayment as "business income," and they identified the loans' purpose as "to provide additional working capital." Pet. App. 7a; Gov't C.A. Br. 16. Because some members of the credit committee had refused to approve the loans, petitioner had Smith arrange for a special meeting of the committee on December 26, 1986, when the objecting members were not present. In his grand jury testimony, Smith stated that the second rollover had no benefit to the bank, but instead kept the loans current on the books and prevented the directors from having to pay interest from their own funds. Smith stated that petitioner forbade him from attempting to collect on the loans. Pet. App. 7a; Gov't C.A. Br. 14-16, 19.

In February 1987, the FDIC examined the bank. The examiners had several concerns about the loans, and Smith responded in writing to the FDIC, explaining ASB's loan review procedures and assuring the examiners that the director loans fully complied with those procedures. At the FDIC's second examination in January 1988, the loans were delinquent but were still listed on the bank's books as assets and accruing interest. The FDIC criticized the loans because of their preferential treatment and the bank's failure to collect them. Pet. App. 7a; Gov't C.A. Br. 17-18.

b. Petitioner also caused the bank to pay excessive dividends to the holding company that he controlled. In the early 1980s, ASB typically declared an annual dividend of approximately 25 cents per share. In 1987, when the bank was already failing, branches were closing, and expenses were being cut, petitioner caused the bank to declare quarterly dividends of $6.50 per

share, for a total of approximately $2.7 million. Pet. App. 8a; Gov't C.A. Br. 25.

Petitioner told the Board that the dividends were necessary to enable the bank's holding company to make payments on a loan from Mellon Bank, and that Mellon Bank had threatened to close ASB if the holding company failed to repay the loan. In fact, Mellon Bank had made no such threat. During the same time period, petitioner caused the holding company to issue dividends of $221,000, $90,000 of which went directly to him. Pet. App. 8a; Gov't C.A. Br. 25-26.

2. Petitioner, Smith, and the other three directors were charged in a 41-count indictment with making false entries in bank books and records, making false statements about loans, conspiracy, bank fraud, and misapplication of bank funds. The bank fraud charges involved the rollover of the director loans and the issuance of the dividends. Indictment 23-26, 31-36, 50.

The defendants moved to dismiss various counts of the indictment for failure to state an offense, and the district court granted the motion to dismiss the conspiracy count, the bank fraud counts, and the false entry counts. The district court held that the bank fraud counts involving the rollovers of the director loans were insufficient because the rollovers did not cause the bank to expend additional funds, and the bank therefore was not deprived of property. The court also held that the indictment was defective because it stated that the defendants "acted * * * with intent to deceive ordinarily in order to bring about a financial gain to [themselves] *but not necessarily to harm or cause economic loss to the bank*," and the court believed that the latter phrase negated the specific intent required under the bank fraud statute. See *United States* v. *Ely*, 142 F.3d 1113, 1117-1118 (9th Cir. 1998).

In dismissing the bank fraud counts involving the payment of the dividends, the district court acknowledged that the defendants had "systematically plundered" the assets of ASB, but the court held that those actions were not fraudulent because petitioner, as the person in control of the bank, "was * * * able to do whatever he wished," and "[e]veryone knew what was going on." *Id.* at 1118.

3. The government appealed, and the court of appeals reversed all of the dismissals, except for the dismissal of two false entry counts against one of the directors. In reinstating the bank fraud counts involving the rollovers, the court held that the indictment sufficiently alleged a property loss because it stated that the defendants had "prevented [ASB] from collecting loans and interest that were due and [had] arranged for [ASB] to create further credit in their favor which would pay the interest due." *Ely*, 142 F.3d at 1119. The court also concluded that the indictment sufficiently alleged that the defendants intentionally engaged in that conduct, and the court therefore held that the indictment adequately alleged their intent to defraud. *Ibid.* The court treated the "awkward and ungrammatical" phrasing to which the district court had objected as surplusage without "significance." *Ibid.*

The court of appeals also held that the bank fraud counts involving the dividend payouts were sufficient. The court explained that the indictment alleged that the defendants had declared the dividends "with reckless disregard for the effects the payment of these dividends would have on" ASB, and that "reckless disregard by fiduciaries of the property committed to their care" is tantamount to intent to defraud the entity owed the fiduciary duty. See 142 F.3d at 1121 (citing cases from various courts of appeals holding that "reck-

less disregard" is equivalent to intent to defraud under Section 1344 and 18 U.S.C. 656, the parallel bank theft statute applicable to bank employees).

4. Petitioner's initial trial ended in a mistrial. The jury found petitioner not guilty on one count but was unable to agree on the other counts. Pet. App. 3a.[1] In November 1999, the case was retried. *Id.* at 3a-4a. In charging the jury on bank fraud, the district court defined the elements of bank fraud as follows:

> One: [Petitioner] knowingly executed or attempted to execute a scheme or artifice:
>
> (a) to defraud Alaska Statebank of money or property as alleged in the indictment, *OR*
>
> (b) to obtain money, funds, or other property owned by or under the custody or control of Alaska Statebank by means of material false or fraudulent pretenses, representations, or promises;
>
> Two: [Petitioner] acted with intent to defraud;
>
> Three: The deposits of Alaska Statebank were insured by the Federal Deposit Insurance Corporation.

Jury Instruction No. 8.3.

The court additionally defined "intent to defraud" as follows:

> To act with "intent to defraud" means to act knowingly and with intent to deceive or cheat,

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[1] Two of the directors entered into cooperation agreements with the government before trial, and a third was a fugitive. The jury found Smith not guilty on four counts but was unable to agree on the other counts. Pet. App. 3a.

> ordinarily for the purpose of causing a financial loss to someone else or bringing about a financial gain to one's self. However the evidence need not establish that Alaska Statebank was actually defrauded, but only that the defendant acted with intent to defraud. An intent to defraud may be demonstrated by the scheme itself. It may also be proven by reckless disregard of the bank's interest. Similarly, the defendant's knowledge of a false statement or his reckless indifference to the truth or falsity of a statement can demonstrate an intent to defraud.

Jury Instruction 6.5. The jury found petitioner guilty of all the bank fraud charges, as well as multiple counts of making false entries and misapplying bank funds. Pet. App. 4a; Gov't C.A. Br. 5.

5. On appeal, petitioner challenged the sufficiency of the evidence on the bank fraud charges on the ground that the government did not prove that the rollover of the loans and the issuance of the dividends were part of a fraudulent scheme. Petitioner also argued that the government did not establish his specific intent to defraud the bank. Pet. C.A. Br. 10-18, 20-25, 27-32; Pet. C.A. Reply Br. 5-9, 11-15, 18-26. Petitioner did not argue that the evidence was insufficient because it failed to show his intent to expose the bank to the risk of economic loss.

The court of appeals held that the evidence was sufficient for a rational jury to find that petitioner engaged in bank fraud. Pet. App. 12a-13a. The court found that the jury could have inferred that petitioner intended to defraud ASB in rolling over the director loans because, as the "architect of the transactions," he engaged in "manipulation of bank policy" "to protect

the prior investments made by the directors." *Id.* at 12a. The court noted that petitioner accomplished the rollovers by, among other things, listing false purposes for the loans on bank documents. *Ibid.* The court also noted that the jury could have relied on Smith's testimony that the purpose of the rollovers was to shield the directors from personal liability. That purpose, the court explained, evidenced "reckless indifference to the bank's interests," which is sufficient to support a jury finding of intent to defraud. *Ibid.*

As to the bank fraud counts based on dispersal of the dividends, the court also concluded that there was ample evidence from which the jury could have inferred petitioner's intent to defraud. Pet. App. 13a. The court noted that petitioner "lied to the Board" to encourage approval of the dividend payments. *Ibid.* The court also stated that petitioner's "actions required paying out $2.7 million in dividends at a time of financial crisis for ASB" and thus evidenced "reckless disregard for the interests of the bank" sufficient to support a finding of intent to defraud. *Ibid.* Finally, the court noted that the fact that the Board had approved the dividends was not an absolute defense but was merely evidence that the jury could have "considered as part of the defense that there was * * * no intent to injure the bank." *Ibid.* (quoting *United States* v. *Unruh*, 855 F.2d 1363, 1368 (9th Cir. 1987)). The court concluded that, because the evidence showed that petitioner "was the moving force behind the board of directors," "the jury could properly have inferred that the Board's action in approving the dividends was dictated by [petitioner] himself and was therefore insufficient to excuse [his] actions." *Ibid.* (quoting *Unruh*, 855 F.2d at 1368-1369, and *United States* v. *Salinas*, 654 F.2d 319, 328 n.12 (5th Cir. 1981)).

ARGUMENT

Petitioner contends (Pet. 10-14) that the Court should grant certiorari in this case to resolve a conflict among the courts of appeals over the scope of the bank fraud statute. Although the courts of appeals disagree on whether exposing or intending to expose a financial institution to a risk of loss is an element of bank fraud, this case is not an appropriate one to resolve that disagreement. Petitioner did not raise the question whether intent to cause a risk of economic loss is a necessary element of bank fraud in the court of appeals, and that court did not clearly resolve the issue. Moreover, there was ample evidence from which a rational jury could have found that petitioner intended to and did expose ASB to a risk of loss. There is thus sufficient evidence to support petitioner's conviction for bank fraud under the approach he advocates, as well as under that taken by any court of appeals. Accordingly, the petition for a writ of certiorari should be denied.

The bank fraud statute makes it a crime "knowingly [to] execute[], or attempt[] to execute, a scheme or artifice—(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1344. The statute thus prohibits "any scheme or artifice to defraud a financial institution or to obtain money or property * * * by means of false or fraudulent pretenses, representations, or promises." *Neder* v. *United States*, 527 U.S. 1, 20-21 (1999). Congress intended the statute, like the mail and wire fraud statutes, to have a broad scope. See S. Rep. No. 225, 98th Cong., 1st Sess. 378-379 (1983). It has been con-

strued to encompass a variety of fraudulent schemes that undermine the integrity of the banking system. See *United States* v. *Brandon*, 17 F.3d 409, 426 (1st Cir.), cert. denied, 513 U.S. 820 (1994); *United States* v. *Rackley*, 986 F.2d 1357, 1361 (10th Cir.), cert. denied, 510 U.S. 860 (1993).

This Court has not defined the intent that a defendant must possess in order to violate the bank fraud statute. Nevertheless, the Court's interpretation of the analogous mail fraud statute makes clear that the essence of a bank fraud scheme is "the deprivation of something of value by trick, deceit, chicane or overreaching." *McNally* v. *United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)). For that reason, several courts of appeals have held that the intent necessary for a bank fraud conviction "is an intent to deceive the bank in order to obtain from it money or other property." *United States* v. *Kenrick*, 221 F.3d 19, 26-27 (1st Cir.) (en banc), cert. denied, 531 U.S. 961 (2000). See *United States* v. *McCauley*, 253 F.3d 815, 819 (5th Cir. 2001) ("The requisite intent to defraud is established if the defendant acted knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to himself."); *United States* v. *LaMarre*, 248 F.3d 642, 649 (7th Cir.) ("'[s]pecific intent to defraud' means that a defendant acted wilfully and with specific intent to deceive or cheat"), cert. denied, 533 U.S. 963 (2001); *United States* v. *Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987) ("[t]he bank fraud statute condemns schemes designed to deceive in order to obtain something of value").

There is some disagreement among the courts of appeals concerning the intent necessary to constitute

bank fraud in certain circumstances. The disagreement concerns whether, in order to establish that the defendant possessed the requisite intent to defraud, the government must prove that the defendant exposed, or intended to expose, a bank to the risk of financial loss. The majority of the courts of appeals that have addressed that issue have rejected such a requirement. See *United States* v. *Everett*, 270 F.3d 986, 991 (6th Cir. 2001) ("to have the specific intent required for bank fraud the defendant need not have put the bank at risk of loss in the usual sense or intended to do so"), cert. denied, No. 01-9504 (Oct. 7, 2002); *United States* v. *De La Mata*, 266 F.3d 1275, 1298 (11th Cir. 2001) ("we believe that 'risk of loss' is merely one way of establishing intent to defraud in bank fraud cases"), cert. denied, 122 S. Ct. 1543 (2002); *Kenrick*, 221 F.3d at 29 (intent to harm bank is not required); *United States* v. *Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995) ("government need not prove that a defendant put a bank 'at risk' to sustain a conviction under section 1344(2)"), cert. denied, 516 U.S. 1082 (1996); see also *LaMarre*, 248 F.3d at 649 (requisite "intent to deceive or cheat" is "*usually* for financial gain for one's self *or* the causing of financial loss to another" (emphases added)). The Second and Fifth Circuits, however, have held that the government must prove, as an element of the offense, that the defendant intended to expose the bank to an actual or potential loss. See *United States* v. *Rodriguez*, 140 F.3d 163, 168 (2d Cir. 1998); *United States* v. *Schnitzer*, 145 F.3d 721, 734 (5th Cir. 1998).[2]

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[2] The Fourth Circuit, in upholding a bank fraud conviction based on the negotiation of forged checks, has stated that "expos[ing]" the bank "to an actual or potential risk of loss" is a required element of bank fraud. *United States* v. *Brandon*, 298 F.3d 307,

The Ninth Circuit has not previously taken a firm position on the question. See *United States* v. *Wolfswinkel*, 44 F.3d 782, 786 (9th Cir. 1995) (stating that "[t]he Ninth Circuit has never adopted a 'risk of loss' analysis in bank fraud cases" and declining to decide the issue). Nor does the unpublished decision in this case provide an explicit answer to that question.[3]

Petitioner did not argue to the court of appeals that the bank fraud statute requires proof of intent to expose the bank to a risk of loss; nor did petitioner argue that the evidence was insufficient because it failed to show that petitioner had that intent. Rather, petitioner argued that the evidence was insufficient because it

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312 (4th Cir. 2002) (quoting *United States* v. *Colton*, 231 F.3d 890, 908 (4th Cir. 2000)). But that court has not, as far as the government is aware, reversed a bank fraud conviction based on lack of proof of that element.

[3] Petitioner suggests that the Ninth Circuit is "internally conflicted on the issue" and has held, in some opinions, that "intent to cause risk of economic loss is not a required element of bank fraud." Pet. 11-12. Any internal conflict within the Ninth Circuit should be resolved by that court rather than this one. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam). There is, however, no internal conflict; rather, the Ninth Circuit has not yet resolved the issue. The two cases cited by petitioner (Pet. 12) do not squarely address the question. In *United States* v. *Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993), cert. denied, 513 U.S. 1059 (1994), the court held that a defendant's belief that the victim will not sustain an economic loss is not a defense. A belief that the victim will not actually sustain an economic loss is not, however, equivalent to a lack of intent to expose the victim to a risk of loss. Similarly, in *United States* v. *Mason*, 902 F.2d 1434, 1442 (9th Cir. 1990), the court held that the bank fraud statute does not require proof that the bank actually incurred a loss or that the defendant intended for the bank actually to incur a loss. The court did not hold, however, that the statute does not require proof of intent to expose the bank to a risk of loss.

showed at most negligence rather than intent to deceive or to defraud. See Pet. C.A. Br. 18, 24, 31; Pet. C.A. Reply Br. 8-9, 15, 21, 23-24. The court of appeals rejected those arguments and concluded that the jury could have inferred petitioner's intent to defraud from his conduct, including his false statements and his "reckless disregard for the interests of the bank." Pet. App. 12a-13a.[4]

Although petitioner seems to assume that the court of appeals did not require any intent to cause a risk of loss to the bank, the court's opinion nowhere states that proof of intent to defraud does not require proof of intent to expose the bank to the risk of loss. To the contrary, the opinion suggests that a defendant would have a valid defense to a charge of bank fraud if he had "no intent to injure the bank." Pet. App. 13a (quoting *United States* v. *Unruh*, 855 F.2d 1363, 1368 (9th Cir. 1987)).

Because the question whether the bank fraud statute requires proof of intent to expose the bank to a risk of loss was not pressed by petitioner, and was not clearly passed upon by the court of appeals, this Court should not address the question in the first instance. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7

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[4] Petitioner's challenge to his conviction focuses on the sufficiency of the evidence. Although the petition refers briefly (at 3) to the jury instructions, petitioner does not seek review of any purported instructional error. Nor is he in a position to do so, as his claim in the court of appeals was limited to a challenge to the sufficiency of the evidence. Pet. C.A. Br. 2, 4: Pet. C.A. Reply Br. 1. Any instructional claim would not properly be raised for the first time here.

(1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[5]

Even if the court of appeals had addressed the question, this case would not be an appropriate vehicle for this Court to resolve the question because its resolution would not affect the disposition of petitioner's sufficiency challenge. There was ample evidence from which a rational jury could have found that petitioner intended to expose and did expose ASB to a risk of loss. Petitioner's direction to officers of the bank to renew the director loans even though he knew that the borrowers would not repay them, his decision to forgo any collection efforts, and his misrepresentation of the purpose of the loans and the source of repayment all placed the bank at risk. The same is true of the issuance of the dividends, which petitioner authorized while knowing that the bank was failing, that employees were being laid off, and that branches were closing. At the very

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[5] The court of appeals also did not address the risk-of-loss question in its earlier opinion reversing the dismissal of the indictment. Although the district court had held the indictment defective in part because it alleged that petitioner's intent was "not necessarily to harm or cause economic loss to the bank," the court of appeals did not decide whether that allegation was inconsistent with the required intent to defraud. Rather, the court of appeals disregarded that language as surplusage to which it "d[id] not attach significance." *Ely*, 142 F.3d at 1119. The court of appeals did hold in its earlier opinion that a fiduciary's "reckless disregard" for the bank's interests is tantamount to intent to defraud, but the question whether "reckless disregard" is tantamount to "intent" is distinct from the question whether the required intent is to expose the bank to the risk of loss. In any event, the petition does not seek this Court's review of the court of appeals' earlier ruling; rather, petitioner acknowledges (Pet. 3) that the earlier ruling "expressly avoided consideration of the 'intent to harm' issue."

least, petitioner's conduct "evidenced a reckless indifference to the bank's interests" from which a jury could rationally infer an intent to expose the bank to potential losses. Pet. App. 12a; cf. *Ely*, 142 F.3d at 1121; *Willis* v. *United States*, 87 F.3d 1004, 1007 (8th Cir. 1996); *United States* v. *Adamson*, 700 F.2d 953, 962 (5th Cir.) (en banc), cert. denied, 464 U.S. 833 (1983).

Petitioner's contention (Pet. 13) that he was not motivated to harm the bank does not negate the ample evidence that he intended to expose the bank to risk. A defendant may hope that no harm actually befalls a bank but still intentionally engage in actions that expose it to potential loss. See *United States* v. *Parekh*, 926 F.2d 402, 408 (5th Cir. 1991) (government can prove intent to injure or defraud bank by "showing a knowing, voluntary act by the defendant, the natural tendency of which may have been to injure the bank even though such may not have been his motive") (quoting *United States* v. *Southers*, 583 F.2d 1302, 1305 (5th Cir. 1978)). Petitioner's conduct thus falls squarely within the statute's proscription under the approach taken by any court of appeals. This case therefore presents no opportunity to resolve the question on which the courts of appeals are divided.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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